

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
February 9, 2007 Session

**OSA QUINELLE HOLMES v. WILLIAM JOSEPH HOLMES**

**Appeal from the Chancery Court for Stewart County**  
**No. 96-7-222     Robert E. Burch, Judge**

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**No. M2006-00408-COA-R3-CV - Filed November 16, 2007**

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This appeal arises from the breach by the defendant of the plaintiff's right of first refusal to purchase real estate. The defendant, the ex-wife of the plaintiff, was awarded the residence and 96 adjoining acres in the divorce, and the plaintiff was awarded the right of first refusal to purchase the property should it ever be sold. However, the defendant sold the property without offering the plaintiff the right to purchase it, and thus, is in breach. The trial court stated that it was awarding the plaintiff damages measured by the difference in the contract price and the fair market value of the property at the time of breach. The defendant appeals contending the evidence was insufficient; however, she failed to provide a verbatim transcript of the evidence or a Statement of the Evidence. Without any evidence to review, we presume the evidence supports the trial court's decision, and therefore, affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., joined. WILLIAM B. CAIN, J., not participating.

Benjamin K. Dean, Clarksville, Tennessee, for the appellant, Osa Quinelle Holmes.

Carrie W. Gasaway, Clarksville, Tennessee, for the appellee, William Joseph Holmes.

**MEMORANDUM OPINION<sup>1</sup>**

Although we do not have a verbatim transcript of the evidence or a Statement of the Evidence, we learn from the pleadings in the record and the briefs that Osa Holmes and William Holmes were divorced in 1998, at which time the court awarded Ms. Holmes the residence and the

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<sup>1</sup>Tenn. Ct. App. R. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

adjoining 96 acres on Terrapin Run in Dover, Tennessee (“the property”), and awarded Mr. Holmes the right of first refusal to purchase the property should Ms. Holmes choose to sell the property.

Five years later, without offering the same to Mr. Holmes, Ms. Holmes sold the property to Ed and Carolyn Bogard for \$95,000. It is undisputed that the sale of the property by Ms. Holmes, which occurred on March 5, 2003, constituted a breach of Mr. Holmes’ right of first refusal to purchase the property.

After making \$25,491 of improvements to the property, the Bogards sold the house along with 52.4 acres of the property for \$125,000. This sale occurred on September 10, 2003. The Bogards retained title to the remaining 44 acres of the property. The 2005 “tax card” showed the appraised value of the remaining 44 acres to be \$33,100.

In June of 2003, Mr. Holmes filed this action against Ms. Holmes to recover damages resulting from her breach of his first right of refusal. Mr. Holmes requested damages equal to the difference between the purchase price paid to Ms. Holmes by the Bogards and the price the Bogards received when they sold the property, plus an additional \$500 per acre for each acre of the 44 acres the Bogards retained.

The case went to trial on March 23, 2005. In an order dated May 16, 2005, the trial court ruled that Mr. Holmes was entitled to a judgment valued by the difference in the amount in which the Bogards sold the 52.4 acre tract (\$125,000) and the price at which Ms. Holmes sold the property to the Bogards (\$95,000) plus the value of the 44 acre tract according to the 2005 tax card appraisal (\$33,100.00) less any improvements made by the Bogards prior to selling the property (\$25,491.02). On January 9, 2006, the court entered an order awarding Mr. Holmes \$37,608.98 in damages.

Being dissatisfied with the judgment, Ms. Holmes filed a motion to alter or amend the judgment. She contended that the trial court failed to apply the proper measure of damages for the breach of a right of first refusal, which is the difference in the contract price and the fair market value of the property at the time of the breach. She also contended that the court erred in relying on the amount the Bogards sold the 52.4 acre tract on September 10, 2003, and in relying on the 2005 tax card appraisal for the 44 acre tract that the Bogards still own. Following a hearing on the motion, the trial court concluded that “[t]he correct measure of damages in the present case . . . is the difference between the contract price that [Ms. Holmes] received from the Bogards, and the fair market value of the property at the time of breach.” The trial court also ruled that “the subsequent September 10, 2003 sale price and 2005 tax card appraisal sufficiently establishe[d] the fair market value at the time of breach to sustain [Mr. Holmes’] burden of proof in regard to damages.” Still dissatisfied with the judgment, Ms. Holmes filed this appeal.

The only issue raised by Ms. Holmes on appeal challenges the trial court’s valuation of Mr. Holmes’ damages. She contends that the trial court erred in holding: (1) the September 10, 2003 sale price sufficiently established the fair market value of the 52.4 acre tract at the time of Ms. Holmes’ March 5, 2003 breach; and (2) the 2005 tax card appraisal sufficiently established the fair market value of the 44 acre tract at the time of Ms. Holmes’ March 5, 2003 breach.

## ANALYSIS

The sole issue on appeal is whether the trial court erred by awarding Mr. Holmes \$37,608.98 in damages. Whether the trial court awarded the proper amount of damages is generally a question of fact. *Beatty v. McGraw*, 15 S.W.3d 819, 829 (Tenn. Ct. App. 1998). In cases where a bench trial was held, we review the damages awarded by the trial court with the presumption of correctness and we will not alter the amount of damages unless it is established that the trial court adopted the wrong measure of damages or the evidence preponderates against the amount of damages awarded. *Id.*

The appellant bears the burden of showing that the evidence presented to the trial court preponderates against the judgment of the trial court. *See Mfrs. Consolidation Serv., Inc. v. Rodell*, 42 S.W.3d 846, 865 (Tenn. Ct. App. 2000) (citing *Coakley v. Daniels*, 840 S.W.2d 367, 370 (Tenn. Ct. App. 1992)); *see also State v. Bunch*, 646 S.W.2d 158, 160 (Tenn.1983) (holding that it is the duty of the party seeking review of the action of the trial court to prepare a record sufficient to enable the reviewing court to determine if the trial court erred). Ms. Holmes, the appellant, failed to favor this court with a transcript of the evidence pursuant to Tenn. R. App. P. 24(b) or a Statement of the Evidence pursuant to Tenn. R. App. P. 24(c). Thus, we have no evidence to consider, only a technical record provided pursuant to Tenn. R. App. P. 24(b).

As we have noted in previous cases, the lack of a transcript or Statement of the Evidence is generally fatal to the party having the burden on appeal. *Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992). This is due to the fact that without a verbatim transcript or Statement of the Evidence, there is no evidence to counter the presumption the parties presented sufficient evidence to the trial court to support the judgment of the trial court. *Rodell*, 42 S.W.3d at 865. With no evidence to counter the presumption of correctness, we have no basis to conclude the evidence is insufficient to support the judgment of the trial court. *Gross v. McKenna*, No. E2005-02488-COA-R3-CV, 2007 WL 3171155 at \*3 (Tenn. Ct. App. Oct. 30, 2007).

## V. CONCLUSION

The judgment of the trial court is affirmed, and the costs of appeal are assessed against the appellant, Ms. Osa Holmes.

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FRANK G. CLEMENT, JR., JUDGE